STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALTON HIGGINS,

Defendant-Appellant.

UNPUBLISHED
March 30, 1999

No. 195865
Recorder's Court
LC No. 95-004678

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony murder (hereinafter "felony-murder"), MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of life imprisonment for the felony murder and armed robbery convictions, and a concurrent term of two years' imprisonment for the felony-firearm conviction. We affirm defendant's felony-murder and felony-firearm convictions but vacate his conviction and sentence for armed robbery.

I

Defendant first asserts that he should be granted a new trial because of the trial court's refusal to give cautionary accomplice instructions. Specifically, defendant argues that because the evidence adduced at trial established that prosecution witness Wayne Young was an accomplice to the crimes charged, either CJI2d 5.4 ("Witness an Undisputed Accomplice") or CJI2d 5.5 ("Witness a Disputed Accomplice") should have been given, along with CJI2d 5.6 ("Cautionary Instruction Regarding Accomplice Testimony"). We disagree.

In *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), the Michigan Supreme Court announced:

> For cases tried after the publication of this opinion, it will be deemed reversible error [for a trial court] . . . to fail upon request to give a cautionary instruction

> concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge.

Because *McCoy* draws an analytical distinction between those situations involving a request for a cautionary instruction and those situations where no request was made, we must first address whether defendant made such a request.

On the third day of the four day trial, discussions were held on the record regarding supplemental jury instructions. At no point during these discussions did defendant request that a cautionary instruction on accomplice testimony be given. However, after the jury was instructed by the court, defense counsel did state that he did not "recall hearing the accomplice testimony instruction." During some back and forth discussions concerning which instruction defense was referring to, the trial judge finally identified CJI2d 5.6 as the relevant instruction. After initially indicating that he was inclined to give the instruction, the trial judge then changed his mind. The judge indicated that he was not going to give the instruction because the prosecution had not charged the two witnesses at issue (one of which was Young) with being accomplices to the crime.

We are inclined to consider the exchange that took place between the trial judge and defense counsel as a request for, and discussion of an appropriate cautionary instruction on accomplice testimony. As indicated, the trial judge did identify CJI2d 5.6 as the relevant instruction. The fact that neither the judge nor defense counsel specifically referenced either CJI2d 5.4 or 5.5 is not dispositive. CJI2d 5.4 and 5.5 simply draw a preliminary distinction between an undisputed accomplice and a disputed accomplice. In other words, both of these instructions are predicates to the giving of CJI2d 5.6, which is the instruction that cautions a jury to carefully examine accomplice testimony.

Although the *McCoy* rule regarding a requested cautionary instruction on accomplice testimony is stated in absolute terms, we do not read the rule as indicating that the giving of such an instruction is mandatory once a request has been made. As with all requested jury instructions, the applicability of a requested instruction on accomplice testimony must be evaluated in terms of the circumstances of the given case. *People v Ho*, ___ Mich App ___; ___ NW2d ___ (1998) (Docket No. 188274, issued 8/14/98), slip op pp 5-6; *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). For example, it would make no sense for a trial court to be required to give such an instruction when the witness at issue has not admitted to being an accomplice, and there was no evidence in the record that could lead a reasonable person to conclude that the witness was indeed an accomplice. See *Ho, supra* at 5-6 (observing that "a trial court is only required to give requested instructions that are supported by the evidence or the facts of the case"); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997) (observing that "[a] trial court need not give requested instructions that the facts do not warrant"); *People v Holliday*, 144 Mich App 560, 574; 376 NW2d 154 (1985) (observing that an instruction about accomplice testimony was unwarranted given there was no evidence to suggest that the witness at issue was an accomplice).

This Court has also held that an accomplice instruction is not warranted when neither side argues that the disputed witness was an accomplice. *People v Allen*, 201 Mich App 98, 105; 505

NW2d 869 (1993). Such is the case here. The People argue that defendant shot and robbed Ramsey. Alternatively, they argue that defendant could also be found guilty if the jury concluded that defendant had aided and abetted another (presumably Young) in the commission of the crimes. Conversely, defendant claims it was Young who shot and robbed Ramsey. Neither side presented Young as an accomplice. Accordingly, because an accomplice instruction would not have fit either party's theory of the case, it was not error for the trial court to reject defendant's request.[1] *Id.*

II

Next, defendant contends that it was improper for the prosecutor to question Young about why he had been unavailable as a witness until the last day of trial. We conclude that defendant has waived appellate review of this matter by failing to object to the line of questioning and by putting the matter of Young's absence in issue by referring to it in his opening statement. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986).

III

Next, defendant argues that his convictions and sentences for both felony murder and armed robbery violate defendant's right against double jeopardy. We agree. Accordingly, defendant's conviction and sentence for armed robbery are vacated. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998).

IV

Defendant next argues that he was denied a fair trial when the trial court allegedly imparted its personal view of the evidence into the trial, and denigrated defense counsel both personally and professionally in front of the jury. We disagree. "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Having reviewed each instance of alleged judicial misconduct, we believe that the trial court's behavior was not of the kind that would unduly influence the jury. *Id.*; *People v Sharbnow*, 174 Mich App 94, 99-100; 435 NW2d 772 (1989).

V

Defendant also argues that reversal is warranted because the trial court erred when it refused to give a requested accessory after the fact jury instruction. Defendant argues that the jury could have found that he helped Young avoid arrest by wiping fingerprints off of the murder weapon, but that he did not actually participate in the murder. Defendant contends that if the jury had been properly instructed, it could have found defendant guilty of accessory after the fact. Assuming arguendo that the accessory after the fact instruction should have been given, we conclude that the trial court's failure to do so was harmless. The jury was instructed on both first-degree felony murder and second-degree murder. Had

the jury had any doubt about defendant's guilt of the charged offense of felony-murder, it could have found defendant guilty of second-degree murder. The jury's rejection of the lesser included offense "'necessarily . . . indicate[s] a lack of likelihood that the jury would have adopted the lesser requested charge.'" *Perry, supra*, 218 Mich App at 537, quoting *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Therefore, because the alleged error was not prejudicial, reversal is not required. MCL 769.26; MSA 28.1096; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

VI

Finally, defendant contends that he received ineffective assistance of counsel. Specifically, defendant contends he was denied a fair trial when his counsel refused to cross-examine Young. We disagree. "To prove a claim of ineffective assistance of counsel . . . a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). We conclude that defendant has failed to establish that he was denied effective assistance of counsel because he is unable to show that he was prejudiced by counsel's inaction.

Defendant's felony-murder and felony-firearm convictions are affirmed. Defendant's conviction and sentence for armed robbery is vacated.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[1] We note, however, that the trial court erred when it concluded that the requested instruction was unwarranted because the prosecution had failed to formally charge Young. While the lack of such a charge can be considered as evidence that a witness is not an accomplice, it is not by itself dispositive.